July 21, 2014

Pima County Board of Supervisors
130 W. Congress, 5th Floor
Tucson, AZ 85701

Subject: Election Integrity Commission Recommendation for Post-Election Audit Procedure

Supervisors,

You will receive a recommendation from the Election Integrity Commission (EIC) to approve an experimental procedure to conduct post-election audits in this year's Primary and General Elections. I strongly urge you to reject that proposal because: (1) it is not authorized in Arizona law, (2) it is preempted by existing election law and (3)it could lead to a recount of the elections and a possible order to conduct new elections.

The recommendation is to conduct an audit where all of the ballots from randomly selected precincts will be extracted from tabulated Early Ballots and the votes marked on those ballots will be compared to the official canvass results for those ballots. The proposal is to conduct this experiment at some point between the completion of the hand audit required by A.R.S. § 16-602 on Saturday following the election and the canvass by the Board of Supervisors on the following Tuesday.

No Legal Authority for Experimental Audits

Pima County conducts its elections under the authority of the Arizona Constitution, Title 16 of the Arizona Revised Statutes and the Secretary of State Election Procedures Manual. Pima County does not have a separate Election Code. There is no provision in any of the authorizing law for an experimental audit. Audits of election results are specifically addressed in A.R.S. § 16-602 and the Election Procedures Manual which provide detailed instructions for exactly how to conduct a post-election audit of both the ballots cast in the polling place on election day and early ballots cast by mail. The described audits are mandatory. There is no suggestion in the statute or the manual that counties are free to develop their own audit procedures either to replace the mandatory audits or to develop alternative experimental methods of auditing election results.

A.R.S. § 16-191 provides that the provisions of Title 16 apply to all elections in the state. This includes the provisions of the hand audits described in A.R.S. § 16-602 and the exclusion of any locally developed experimental methods of conducting post-election audits.

Proposed Experimental Audit is Preempted by State Law

Preemption is a legal doctrine that holds that laws enacted by federal or state government will preempt contradictory or conflicting laws enacted by lesser jurisdictions where the conflicting law is expressly preempted by the higher jurisdiction or where it is evident that the higher jurisdiction intended to "occupy the field." In this case, the Arizona legislature has occupied the field of post-election audits by enacting A.R.S. § 16-602. Arizona has a general election law which applies to all counties. The reason for this is that many officers and representatives elected by the voters of the state are from jurisdictions that cross county lines. For this reason, it would violate uniformity of election laws for each county to enact its own election laws and to develop its own election procedures.

Possibility of a Recount Resulting from Experimental Audit

The post-election audit procedures contained in A.R.S. § 16-602 and the expansion of instructions for these audits in the Elections Procedures Manual are extremely detailed. The objective of these audits is to ascertain that the machines used in

the elections accurately count the votes marked on the ballots and that the reported results are correct. In the event a difference greater than the designated margin is discovered between the announced electronic tabulation results and the hand audit results, the hand audit results become the official count. That change of results could become the basis for a recount of the ballots under A.R.S. 16-641. Under A.R.S. § 16-662, this recount could lead to an action in Superior Court ordering a recount of the entire election.

None of these provisions are included in the proposal for the experimental audit. So the question arises, what happens if the experimental audit shows a discrepancy? What actions should be taken? There are no answers to these questions because the experimental audit is not authorized by law. The discrepancy might be caused by human error, i.e., the auditors failed to locate and audit every ballot that was cast or they might evaluate the vote marks differently from the tabulation equipment.

Proposed Experimental Audit Method Difficult or Impossible to Execute

The proposal is to conduct an audit of the early ballots from the selected precincts rather than by batches of early ballots as required by law. To conduct this audit the election staff will need to open sealed boxes of tabulated ballots and extract the ballots for the selected precincts. It is estimated this will take 10 to 12 people two days to accomplish as they will need to go through about 100 to 200 boxes of 500 to 1000 ballots each to locate these ballots. I am very doubtful this can be completed with 100% accuracy. Currently we have no records of which particular ballots are in any box. We only know the number of ballots in the box. Removal of these ballots from the sealed boxes will disrupt the custodial accounting records that are required by law. Once the audit is completed it will be necessary to reinsert the extracted ballots back into the correct boxes (1) to reestablish the custodial record and (2) to minimize the disruption of evidence that may be required in the event of an election contest. It has been proposed that the Recorder can generate a record of the precincts that are included in each batch of ballots transferred from the Recorder to the Elections Department. That may be technically possible but we don't currently have that capability. In addition, ballots that must be duplicated or that have write-in votes are removed from their original batches. There has been no coordination with the Recorder to support this proposal.

Ballot Secrecy Will Be Compromised

The Recorder currently generates a list of voter names from the affidavit envelopes when they transfer a batch of ballots to the election department. This list does not include the precinct for the voter. However, we have numerous precincts (approximately 50% for Libertarian voters) where less than 10 voters of that party reside in a precinct. Where we pull one or two ballots for a minor party voter from a precinct, audit those ballots and provide a public report, it will be a matter of public record as to how that voter marked their ballot, thereby violating the secrecy of the ballot.

For these and numerous other reasons I strongly urge you to reject the recommendation from the EIC that you authorize an experimental post-election audit method for the Primary and General elections of 2014.

Respectfully submitted,

Benny E. White
Republican Representative, Election Integrity Commission